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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

A. S., a Minor, etc., et al., Plaintiffs and Appellants, v. JOHN CARDIN, Defendant and Respondent.	B209332 (Los Angeles County Super. Ct. No. VC049046)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Reversed.

Nathaniel J. Friedman for Plaintiffs and Appellants.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Margaret M. Holm, and Lisa M. Panique for Defendant and Respondent.

Plaintiffs have appealed from the adverse summary judgment entered on their complaint for wrongful life, medical malpractice, and loss of consortium. Based on our determination that triable issues of material fact exist with regard to the standard of care and causation, we reverse and remand for further proceedings.

BACKGROUND

Plaintiffs Norma S. and Juan S. are the parents of plaintiff A. S., who was born with Down Syndrome in February 2007. Defendant John Cardin, M.D., is the obstetrician and gynecologist who cared for Mrs. S. during her pregnancy with A. S.

The operative pleading, the second amended complaint, alleged three causes of action against Dr. Cardin: (1) A. S.'s claim for wrongful life;[1] (2) Mrs. S.'s claim for medical malpractice; and (3) Mr. S.'s claim for loss of consortium.[2] All three claims were based on common fact allegations that Dr. Cardin negligently failed to provide Mrs. S. with any prenatal genetic testing and, as a result, negligently failed to diagnose A. S.'s chromosomal disorder while termination of the pregnancy was feasible. With

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[1] "California recognizes an impaired child's right to recover damages for 'wrongful life.' (*Turpin v. Sortini* (1982) 31 Cal.3d 220.) The essence of a wrongful life action is that 'if defendants had performed their jobs properly, [plaintiff] . . . would not have been born at all.' (*Id.* at p. 231.) In such a case, an impaired child may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment from which he or she suffers. (*Id.* at p. 239.) Wrongful life is basically one form of a medical malpractice action. (*Id.* at p. 229.)" (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1419-1420.)

"An infant may maintain a 'wrongful life' action for special damages when the defendant has 'failed to diagnose and warn the parents of the probability that an infant will be born with a hereditary ailment or disability and the infant is in fact born with that ailment.' (*Foy v. Greenblott* (1983) 141 Cal.App.3d 1, 14.)" (*Barragan v. Lopez* (2007) 156 Cal.App.4th 997, 1004.)

[2] A negligence per se claim in the first amended complaint was dismissed when the trial court sustained, without leave to amend, a demurrer to that claim.

regard to the applicable standard of care, plaintiffs contend that the law requires clinicians to provide the alfa-fetoprotein (AFP) test to all pregnant women before the 140th day of gestation or the 126th day from conception (Cal. Code Regs., tit. 17, § 6527 (section 6527)), which allegedly was not done in this case.

Dr. Cardin moved for summary judgment or, alternatively, summary adjudication, based on the expert declaration of Martin Feldman, M.D. Dr. Feldman concluded that Dr. Cardin had complied with the applicable standard of care based on his review of Mrs. S.'s medical records, which contained the following relevant dates: At Mrs. S.'s first prenatal visit on September 5, 2006, an ultrasound examination revealed that she was at 13 4/7 weeks of gestation. Mrs. S. missed her second prenatal visit on October 3, 2006, which was rescheduled for October 17, 2006, but was also missed. When Mrs. S. appeared for her next prenatal visit on November 16, 2006, she was at 24 2/7 weeks gestation, which was beyond the period for AFP testing.

Dr. Feldman attributed Mrs. S.'s failure to receive AFP testing to her failure to appear at the two October 2006 appointments during the period when AFP testing was possible, between weeks 15 and 20 of gestation. Dr. Feldman stated that Mrs. S.'s failure to receive other forms of genetic testing was not a violation of the standard of care, given that her medical records showed no need for other testing. In Dr. Feldman's opinion: (1) amniocentesis was not required, given that Mrs. S. did not have a positive AFP test; (2) chorionic villus sampling (CVS) was not required because it is usually offered only to those who are over age 35 or who have had a positive first trimester screening test, and Mrs. S., who was 33 years old, fell under neither category; and (3) nuchal translucency testing was not required because most OB/GYN practitioners did not offer such testing, either at their offices or at outside facilities. Dr. Feldman concluded that, "[t]o a reasonable degree of medical probability, nothing Dr. Cardin allegedly negligently did or failed to do caused harm to plaintiff, [A. S.]. As articulated above, AFP testing is time sensitive, and Mrs. [S.] did not return as scheduled to Dr. Cardin during the time period when AFP testing could have been performed. No other genetic testing was available and/or clinically indicated for Mrs. [S.]. As such, to a reasonable degree of medical

probability, no act or omission by Dr. Cardin negligently caused or contributed to plaintiff's alleged injury, his birth."

In opposition, plaintiffs submitted the expert declaration of Myra Levinson, M.D., who contended that Mrs. S.'s failure to appear for prenatal visits during the time frame for AFP testing did not in itself rule out a violation of the applicable standard of care. In Dr. Levinson's opinion, under the applicable standard of care, Dr. Cardin should have explained to Mrs. S. at the *first* prenatal visit that the time frame for AFP testing was limited and that she was scheduled to have an AFP test at her next appointment on October 3, 2006.

Included in Mrs. S.'s medical records was her June 29, 2007 signed statement (Health & Saf. Code, § 123111, subd. (b)),[3] in which she disputed Dr. Cardin's notations in her medical chart that she had missed an "appointment for AFP" testing. Mrs. S. denied being told about an "appointment for AFP" testing, and stated that Dr. Cardin had never discussed or offered any other form of genetic testing. She stated that her medical "chart, [which was] prepared exclusively by Dr. Cardin and his assistants," "makes at least three references to my missing an appointment for AFP. [¶] That is false, and a lie. [¶] At no time did Dr. Cardin tell me, in person or by telephone, as I was instructed to communicate with him during the period September 5, 2006 to November 16, 2006 that I 'had an appointment on October 3d,' (or any other date) for 'an AFP test.' [¶] In addition, Dr. Cardin never talked to me about the possibility of C.V.S. testing as an alternative to AFP testing, nor did Dr. Cardin ever talk to me or discuss the possibility of

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[3] Health and Safety Code section 123111 provides in relevant part: "(a) Any adult patient who inspects his or her patient records pursuant to Section 123110 shall have the right to provide to the health care provider a written addendum with respect to any item or statement in his or her records that the patient believes to be incomplete or incorrect. The addendum shall be limited to 250 words per alleged incomplete or incorrect item in the patient's record and shall clearly indicate in writing that the patient wishes the addendum to be made a part of his or her record. [¶] (b) The health care provider shall attach the addendum to the patient's records and shall include that addendum whenever the health care provider makes a disclosure of the allegedly incomplete or incorrect portion of the patient's records to any third party."

amniocentesis as a second alternative to A.F.P. testing. [¶] Finally, at no time did Dr. Cardin discuss with me, or recommend to me the possibility of nuchal lucency testing. [¶] As a result of the failure of Dr. Cardin to offer A.F.P., C.V.S., amniocentesis or nuchal lucency, and other medical errors and omissions occurring over the course of my pregnancy, and the withholding of information, I delivered a Down Syndrome baby on February 20, 2007."

In light of Mrs. S.'s statement that she had not been informed about AFP or other types of genetic testing, Dr. Levinson explained that physicians are required by "California regulations" to offer AFP testing "during the 15-20 week 'window' (herein, about September 19-October 25, 2006)," and that physicians customarily provide "the California AFP information booklet . . . to the patient on her FIRST visit regardless of whether that is in the first trimester or the second trimester, so that the patient is able to discuss same with her husband at home."[4]

Dr. Levinson stated that it would have been especially important for Dr. Cardin to inform Mrs. S. about AFP testing at the first prenatal visit, because, according to information available to Dr. Cardin, Mrs. S. has a family history of Down Syndrome. Dr. Levinson stated that, "[i]f, at her first visit, Dr. Cardin established by ultrasound that she was 13 4/7 weeks pregnant, it would have been the time to offer an explanation of what was to take place at the next visit, i.e., AFP testing and impress upon the patient the time restraints of the test, especially since the information available to Dr. Cardin

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[4] As indicated in Dr. Levinson's declaration, California law requires that physicians provide and discuss with their patients the approved California AFP information booklet at the *first* prenatal visit. (§ 6527, subd. (a); *Galvez v. Frields*, *supra*, 88 Cal.App.4th at pp. 1413-1416, 1423 [section 6527 establishes a standard of care].) Although Dr. Feldman did not expressly mention section 6527, he conceded that Mrs. S. was not given the state-mandated information booklet at the first prenatal visit. Dr. Feldman attested that it was his "understanding that the California AFP information booklet and consent form would be given to Mrs. [S.] at the [second] October 3rd appointment for her review before drawing blood for the AFP testing." Dr. Feldman expressed no opinion in his declaration as to whether Dr. Cardin's failure to provide the booklet at the first appointment was a violation of the applicable standard of care.

included a family history of Down Syndrome." Dr. Levinson declared that, in her expert opinion, Dr. Cardin's failure to provide and discuss the state-mandated information regarding AFP testing at the first prenatal visit "was grossly below the standard of care."

Regarding causation,[5] Dr. Levinson stated that she reasonably believed that Mrs. S. would have agreed to an AFP test had it been explained to her at the first prenatal visit, given that Mrs. S. had consented to have an AFP test during her previous pregnancy in 2003, as have "virtually all" of Dr. Levinson's patients for the past 20 years. In addition, given that A. S. was born with Down Syndrome, Dr. Levinson stated that there was a reasonable probability that Mrs. S.'s AFP test would have been positive. A positive AFP test result would have "likely" led to an amniocentesis, "which almost to a certainty, would have revealed the genetic defects from which the fetus suffered and allowed Mrs. [S.] to make a considered decision as to whether or not to continue the pregnancy." Based on Dr. Levinson's information and belief "that Mrs. [S.] would have terminated the pregnancy had she known, prior to viability, that the fetus was defective," Dr. Levinson concluded that Dr. Cardin's "negligence was a substantial factor in the outcome herein, to wit, the birth of a Down Syndrome child."

Neither Dr. Feldman's declaration nor the trial court's summary judgment ruling discussed the applicable standard of care in light of Mrs. S.'s signed statement, which was contained in her medical records, denying that she had been advised by Dr. Cardin about AFP or other forms of genetic testing as required by section 6527. Without mentioning Dr. Cardin's alleged violation of section 6527, the trial court found that Dr. Feldman's declaration was sufficient to establish that Dr. Cardin had complied with the applicable standard of care, and concluded that the burden had shifted to plaintiffs to

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[5] "In a medical malpractice action the element of causation is satisfied when a plaintiff produces sufficient evidence 'to allow the jury to infer that in the absence of the defendant's negligence, there was a *reasonable medical probability* the plaintiff would have obtained a better result. [Citations.]' (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 216, italics added.)" (*Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1314-1315.)

demonstrate the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)[6] The trial court further determined that Dr. Levinson's counterdeclaration was "insufficient to create a triable issue of material fact," because it was "replete with legal argument and conclusion." The trial court stated that because "all three causes of action are grounded in medical malpractice, and plaintiffs failed to submit the requisite medical opinion demonstrating a disputed fact with respect to causation, summary judgment must be granted on that basis."

The trial court entered summary judgment for Dr. Cardin. Plaintiffs have timely appealed from the judgment.[7]

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[6] "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).)

In this case, the trial court found that Dr. Feldman's declaration showed that Dr. "Cardin acted within the applicable standard of care in his treatment of plaintiffs. Specifically, he opines that the genetic testing either could not be performed or was not clinically indicated to be performed. [Record citation omitted.] His opinions are based (in part) on plaintiff's medical records, which the Court finds were properly submitted into evidence and authenticated through the deposition testimony of defendant."

[7] The appeal was taken from the "Order Granting Defendant, John P. Cardin, Jr., M.D.'s, Motion for Summary Judgment." The order included language stating that "judgment shall be entered in his favor and against plaintiffs," which we construe to be a final judgment, notwithstanding the title of the order.

DISCUSSION

I. Summary Judgment

The standard of review for summary judgment is well established. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.) "Because this case comes to us on [Dr. Cardin's] summary judgment motion, we strictly construe [Dr. Cardin's] evidence and liberally construe plaintiffs' evidence, resolving any doubts in plaintiffs' favor. (*Aguilar* [*v. Atlantic Richfield Co.* (2001)] 25 Cal.4th [826,] 860.)" (*Barragan v. Lopez*, *supra*, 156 Cal.App.4th at p. 1003.)

In performing our independent review of the evidence, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

Of the numerous issues raised by plaintiffs, we find that one is dispositive. Plaintiffs contend that Dr. Feldman's declaration was insufficient to establish that Dr. Cardin had complied with the applicable standard of care as a matter of law. Plaintiffs argue that Dr. Feldman's declaration was insufficient because it failed to discuss the standard of care in light of their allegation that the AFP booklet and information were not provided and discussed with Mrs. S. at the first prenatal visit, in violation of section 6527. We agree.

"'The standard of care in a medical malpractice case requires that medical service providers exercise that . . . degree of skill, knowledge and care ordinarily possessed and

exercised by members of their profession under similar circumstances. The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action . . . .' (*Alef v. Alta Bates Hospital*[, *supra*,] 5 Cal.App.4th 208, 215.)" (*Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 108, fn. 1.)

In *Galvez v. Frields*, *supra*, 88 Cal.App.4th 1410, we concluded that section 6527's mandates regarding the genetic testing of pregnant women established the relevant standard of care with regard to the plaintiffs' medical malpractice and wrongful life claims against the defendant physician who had failed to provide an AFP test to his pregnant patient, who gave birth to a child with neural tube defects. (*Id.* at p. 1423.) In this case, we similarly conclude that section 6527 sets forth the applicable standard of care. Section 6527 states that because of the "strict gestational and time limits wherein prenatal detection of birth defects of the fetus is feasible, clinicians shall make every reasonable effort to schedule screening and differential diagnostic tests and procedures appropriately with respect to the gestational dates of the pregnant woman." (§ 6527, subd. (i).) Significantly, section 6527 requires clinicians to *provide and discuss* state-mandated genetic testing information with their pregnant patients at the *first* prenatal visit: "Clinicians shall provide or cause to be provided to all pregnant women in their care before the 140th day of gestation, or before the 126th day from conception, as estimated by medical history or clinical testing, information regarding the use and availability of prenatal screening for birth defects of the fetus. *This information shall be in a format to be provided or approved by the Department and shall be given at the first prenatal visit and discussed with each pregnant woman*." (*Id.* at subd. (a); italics added.)

Because section 6527 applies to all clinicians, we necessarily conclude that it states the applicable standard of care that Dr. Cardin was required to follow in treating Mrs. S. during her pregnancy. (*Galvez v. Frields*, *supra*, 88 Cal.App.4th at p. 1423.) In line with section 6527's mandates, Dr. Levinson described the applicable standard of care as follows: "Customarily, the California AFP information booklet is given to the patient on her FIRST visit regardless of whether that is in the first trimester or the second

trimester, so that the patient is able to discuss same with her husband at home." "If, at her first visit, Dr. Cardin established by ultrasound that [Mrs. S.] was 13 4/7 weeks pregnant, it would have been the time to offer an explanation of what was to take place at the next visit, i.e., AFP testing and impress upon the patient the time restraints of the test, especially since the information available to Dr. Cardin included a family history of Down Syndrome."

Significantly, Dr. Feldman did not attempt to refute Mrs. S.'s assertion in her signed statement, which was included in her medical records, that Dr. Cardin did not discuss or provide the California AFP information booklet at the first prenatal visit. On the contrary, Dr. Feldman tacitly acknowledged this omission by stating that it was his understanding that Mrs. S. would have been given the booklet at the next October 3rd appointment. Dr. Feldman stated: "After conducting an ultrasound, Dr. Cardin determined [at the first prenatal visit that] she was at 13 4/7 weeks gestation. . . . The chart reflects that . . . AFP testing was to be done at her next appointment in 4 weeks. Plaintiff's next visit was scheduled for October 3, 2006. *It is my understanding that the California AFP information booklet and consent form would be given to Mrs.* [*S.*] *at the October 3rd appointment for her review before drawing blood for the AFP testing.*" (Italics added.)

Given that section 6527 specifically requires all clinicians to *provide and discuss* genetic testing information at the *first* prenatal visit, we conclude that Dr. Feldman's failure to discuss the omissions alleged in Mrs. S.'s signed statement was a significant flaw in his declaration. "An expert's opinion is only as good as the facts upon which it is based. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510-511.)" (*Barragan v. Lopez*, *supra*, 156 Cal.App.4th at p. 1007.) In our view, Dr. Feldman's failure to discuss Dr. Cardin's purported violation of section 6527, as alleged in Mrs. S.'s signed statement, severely undermined his opinion that Dr. Cardin did not breach the applicable standard of care. We therefore find that Dr. Feldman's declaration was insufficient to establish that Dr. Cardin had complied with the applicable standard of care set forth in section 6527.

In light of our determination that the evidence in support of the motion failed to establish defendant's compliance with the applicable standard of care, we conclude that the issue of causation should not have been determined as a question of law. "[T]he elements of actionable negligence, in addition to a duty to use due care, include breach of that duty and a legal causal connection between the breach and plaintiff's injuries. Moreover, breach of duty is usually a fact issue for the jury. If the circumstances permit a reasonable doubt whether the defendant's conduct violates the standard of due care, the doubt must be resolved by the jury as an issue of fact rather than of law by the court. Like breach of duty, causation also is ordinarily a question of fact which cannot be resolved by summary judgment. The issue of causation may be decided as a question of law only if, under undisputed facts, there is no room for a reasonable difference of opinion. (*Onciano v. Golden Palace Restaurant, Inc.* (1990) 219 Cal.App.3d 385, 394-395.)" (*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1687; *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531-1532.) Given the moving party's failure to establish that plaintiffs' claims were meritless, we necessarily conclude that the burden never shifted to plaintiffs to establish a triable issue of material fact. (See *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.)

II. Constitutional Challenge

On October 17, 2007, the trial court granted Dr. Cardin's motion to strike plaintiffs' punitive damages claim from the complaint. The trial court stated that plaintiffs' "claim for punitive damages is improper in that they did not first seek leave of court to so allege. C.C.P. § 425.13. The Court does not agree with plaintiffs' argument that the statute is unconstitutional, and the authority provided does not so hold."

On appeal, plaintiffs contend that sections 425.10 and 425.13 of the Code of Civil Procedure are facially invalid because they violate the right of free speech under the state and federal Constitutions. We decline to reach this issue.

"It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and '"'all intendments and presumptions are indulged in favor of its

correctness.'" [Citation.]' (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.) It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)" (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

Plaintiffs have failed to provide reasoned argument and citations to relevant authority to support their contention that the statutes are facially invalid. In particular, they have failed to show that there are no other remedies short of declaring the statutes invalid. As Dr. Cardin points out, plaintiffs could have sought leave to amend their claim for punitive damages, but failed to do so. Plaintiffs do not refute this assertion in their reply brief. We decline to address the constitutional issues, which are not adequately briefed or ripe for judicial review. "Where reasonably possible, we are obliged to adopt an interpretation of a statute that renders it constitutional in preference to an interpretation that renders it unconstitutional. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 60; *Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 254.) Even judicial reformation of a statute is preferable to invalidation where reformation would better serve the intent of the Legislature. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661.) Principles of judicial self-restraint similarly require us to avoid deciding a case on constitutional grounds unless absolutely necessary; nonconstitutional grounds must be relied on if they are available. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 10.)" (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 671.)

III. Disqualification of Trial Judge

We also decline to address plaintiffs' contention that the trial judge should be disqualified. Under Code of Civil Procedure section 170.6, subdivision (a)(2), a peremptory challenge may be filed following reversal of a final judgment if the same judge is assigned to hear the case on remand. This provision applies here, because the matter will be remanded for a new trial within the meaning of Code of Civil Procedure section 170.6. (*Stubblefield Construction Co. v. Superior Court* (2000) 81 Cal.App.4th 762, 765-766 [trial after partial reversal of summary judgment constitutes a new trial under Code Civ. Proc., § 170.6].)[8]

DISPOSITION

The summary judgment for defendant is reversed. Plaintiffs are awarded their costs.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.

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[8] We are compelled to admonish Mr. Friedman for his attack on the integrity of the trial court, which can be described as nothing less than scurrilous. His accusation is wholly unsupported by the record.